

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In re Application of

NATIONAL  
INNOVATIVE  
PROGRAMING  
NETWORK, INC.  
OF THE EAST COAST

File No. BPTTL-810112LE

For a Construction Permit  
for a New Low Power Television  
Station on Channel 19,  
New York, New York

# MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1987 Released: September 22, 1987

By the Commission:

1. The Commission has under consideration an Application for Review filed February 17, 1987, by Poseidon Productions, Inc. (Poseidon), of the action of the Chief of the Video Services Division, Mass Media Bureau, taken pursuant to delegated authority on December 19, 1986. Therein, the Bureau denied Poseidon's petition to deny the above-captioned low power television application filed by National Innovative Programming Network, Inc., of the East Coast (National). National's application had been chosen as the tentative selectee of a low power television construction permit for Channel 19, New York, New York, in lottery group L85-488 on April 29, 1985.<sup>1</sup> National opposed Poseidon's application for review, and Poseidon replied.

2. Poseidon based its petition to deny on two issues. First, Poseidon maintained that National did not have reasonable assurance of the antenna site on the property of Fordham University which it specified in its amendment of September 21, 1982. In support of this allegation, Poseidon submitted a May 15, 1985, affidavit from Joseph J. McGowan, Fordham's Dean of Students and Vice President for Student Affairs, denying having had any contacts with National regarding the site.

I can state unequivocally that no agreement or understanding has been entered or effected with National . . . or any other Low Power Television Station applicant before the . . . FCC, for the use of WFUV-FM's tower . . . Neither I, nor to the best of my knowledge, has anyone on my staff, been contacted by National . . . relative to the use of the WFUV-FM site.

The second argument raised by Poseidon was that National's amended application had given contradictory information regarding the proposed antenna's specified height above average terrain (HAAT), allegedly in dis-

regard of the Commission's "complete and sufficient" acceptance standard for low power television and television translator applications.

3. In its opposition, National countered the McGowan affidavit with a June 6, 1984, letter written by National's counsel to Fordham's President, James C. Finlay. The letter states:

I am writing to you concerning antenna leasing on the campus of Fordham University located in New York City.

National Innovative Programming Network, Inc. is pursuing an application with the FCC for license on Channel 19 in New York City.

Contingent on the event that we are successful in obtaining the license to operate a T.V. translator station *and that we are able to negotiate mutually acceptable terms with you*, it is understood that you will lease the antenna space to us.

Please indicate your concurrence with this letter by signing in the space provided below and return to me at your earliest convenience . . . [Emphasis in the letter.]

The letter was returned to counsel, with President Finlay's signature at the bottom of the page, marked "ACCEPTED" and dated June 27, 1984. In response, Poseidon argued that the doubts raised by the two conflicting documents should be resolved by a hearing; and that the contingencies in the letter to President Finlay violated the Commission's requirements for site availability.

4. On October 28, 1985, National submitted a letter written three days earlier by the new President of Fordham University, Joseph A. O'Hare, to the law firm representing National "confirm[ing] our acceptance in principle of such a proposal" to lease National its tower.<sup>2</sup> The letter refers to an October 22, 1985, meeting between President O'Hare, Dr. Ben Ichinose, President of National, and National's attorney "to discuss your proposal to locate a low power station at Fordham University. In particular, we discussed the proposed leasing of an antenna on the tower of Keating Hall, where our university radio station WFUV has its transmitter and antenna." The letter continues:

With this letter, I want to confirm our acceptance of such a proposal. My predecessor, the Rev. James C. Finlay, S.J., had already indicated the University's interest in this proposal in his response dated June 27, 1984, to the letter of [National's counsel] . . . I am pleased to note that considerable progress has been made in achieving the two objectives noted in that letter, namely your success in obtaining a license to operate a TV translator station and our ability to negotiate mutually acceptable terms for the agreement between Fordham University and National . . . It is my hope that in further discussions with you and Mr. Ichinose we will be able to bring this agreement to a successful conclusion.

In response, Poseidon maintained that this letter lacked material terms establishing National's right to lease space on the tower at the time of the filing of its amended application in September 1982, as required by the Commission's rules.

5. National responded on November 12, 1985, with sworn statements by its consulting engineer, George Jacobs, and by its president's former in-house counsel, R. Bruce Paschal, Jr. Both men averred that in August and September 1982, National and Fordham had discussed the possibility of locating a low power television antenna on the WFUV tower on the Fordham campus and that Fordham had agreed to allow National to list that site in its amended application. National concluded that these communications constituted a reasonable assurance of site availability at the time that it filed its amended application and that, in conjunction with the more recent agreements with Fordham, proved that National had exceeded the Commission's site availability requirements. Mr. Jacobs reported three communications with Fordham authorities, two in which he participated and one in which Mr. Paschal participated. According to Mr. Jacobs, in early August 1982 it had become apparent to him that the original Empire State Building site had to be changed in order to protect the use of Channel 19 by land mobile radio in Philadelphia. Instructed by Mr. Paschal to seek a new site, Mr. Jacobs began contacting FM stations with towers located in northern New York City.

6. Upon contacting Donald Barnett, manager of Fordham's WFUV-FM station, Mr. Jacobs was told that "it might be possible to use the existing WFUV tower on Keating Hall. He [Barnett] said that the station was planning to file an application for a new tower location on campus, and once the new tower was in operation WFUV would no longer need the existing tower." Mr. Jacobs reported that in mid-August 1982 he had transmitted this information by a telephone conference call to National's communications attorney and to Mr. Paschal, advising them to contact WFUV's station manager in order to make the necessary arrangements for use of the WFUV tower. Mr. Jacobs stated that in early September 1982, he had been informed by Mr. Paschal "that Fordham authorities were agreeable for the WFUV-FM tower location to be shown in the amended . . . application." Mr. Jacobs stated that in his role as a consulting engineer, he checked the availability of tower locations before completing preparation of applications. Consequently, on September 16, 1982, he called the WFUV station manager, Donald Barnett, and read him a statement drafted for inclusion in the amended engineering statement in the application:

The location is Keating Hall on the campus of Fordham University. The tower that will be used is presently used for the WFUV-(FM) antenna. WFUV-(FM) expects to file shortly for a change in location, making the tower and location available for the proposed LPTV station.

Mr. Jacobs maintained that the station manager "had no objection to this statement appearing in the application. He [the station manager] did point out, as is customary in such cases, that such use was contingent upon FCC approval for a new location for WFUV's tower and upon final negotiations at a later date concerning rental fees and conditions." Poseidon, however, argued that Mr. Barnett's alleged "no objection" did not signify agreement, especially in view of the fact that National's use of the site was contingent upon the Commission's approval of Fordham's

application for a new WFUV tower location and upon future negotiations regarding rent and other lease conditions.

7. Mr. Paschal, in his sworn statement of November 6, 1985, stated that in August 1982, he had participated in a conference call with Mr. Jacobs and with National's communications attorney in order to negotiate several transmitter and antenna sites for National. According to Mr. Paschal, one of the sites he had been asked to contact was at Fordham University, and he contacted a Fordham official in August 1982. "We discussed locating [National's] transmitter and antenna at Fordham's facilities in the Bronx. I also explained to him the mutual advantages that would accrue to both parties from a relationship, including lease payments to Fordham and various educational benefits to its students. He told me during September of 1982 that he was agreeable to the idea of locating the . . . transmitter and antenna at Fordham." Mr. Paschal could not, however, remember the name of the official with whom he spoke, but he does recall that the official held an authoritative position. "I have searched my files . . . but was unable to locate any pertinent notes or other records for this time period. The . . . offices were moved during December of 1982 and it appears records were lost or misplaced." In response to this submission, Poseidon complained that Mr. Paschal had failed to produce pertinent notes or other records from the conversation and could not even remember the name of the Fordham official with whom he had allegedly spoken.

8. The Bureau found that Poseidon had failed to raise a substantial and material question of fact as to whether National had reasonable assurance of an available site when it filed its amended application. Based on the information submitted, the Bureau also concluded that National had made a sufficient showing of continuing availability of a site. The Bureau stated that National's reasonable assurance was not diminished by Fordham's pending site change application or by the fact that not all the details of the National-Fordham lease arrangement had yet been formulated. To disapprove a television translator application due to the pendency of the lessor's site change application, stated the Bureau, would be tantamount to predicting that Fordham's application would not be granted. The Bureau opined that the most recent communications between National and Fordham, *i. e.*, the June 1985 letter to President Finlay and the October 1985 letter from President O'Hare, exemplified Fordham's continuously favorable disposition toward National's use of its antenna site and reaffirmed the reasonableness of National's original assurance that the site would be available to it. The Bureau additionally noted that HAAT information was neither a required nor an essential element in a low power television or television translator application, because any information needed for Commission HAAT specifications would be computer-generated from the Commission's own data base. Therefore, concluded the Bureau, erroneous applicant-supplied HAAT information did not enter into the processing and was not a fatal error.<sup>3</sup>

9. In its application for review, Poseidon maintains that the Bureau erred in concluding that National's submissions proved that National has or ever had reasonable assurance of a transmitter site. Poseidon maintains that the consulting engineer's alleged conversation with WFUV's station manager is substantively lacking in detail; that the conversation has never been corroborated; that the en-

gineer is not a disinterested party; and that his statements concerning what the station manager told him are hearsay. Poseidon also contends that National's in-house counsel's statements are uncorroborated and hearsay. Poseidon argues that, in any event, the consulting engineer's sworn statement shows nothing more than that Fordham had agreed to let National include "certain language" in its application. Poseidon maintains that although a formal written agreement need not be negotiated, the Commission does require some firm understanding between the parties. Poseidon restates its earlier argument that, at best, the possibility of National's using the Fordham antenna site is contingent upon Fordham's vacating its current broadcasting tower, an event that may never occur. Finally, Poseidon maintains that even a minor discrepancy or inconsistency in a low power television or television translator application mandates a return of the application, pursuant to the Commission's "complete and sufficient" processing standard. Thus, argues Poseidon, National's allegedly contradictory HAAT information mandated a return of its application.

10. In order for an evidentiary hearing to be held, the Commission must first determine that the petition to deny sets forth "specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1). In addition, the Commission must conclude that "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice . . . a substantial and material question of fact is presented." 47 U.S.C. Section 309(d)(2). In the case before us, we believe that the Bureau was correct in its analysis of the facts and in its conclusion that a hearing was not warranted. The only concrete information submitted by Poseidon in this regard is Dean McGowan's letter, which states that no agreement or understanding has been reached with regard to use of the WFUV tower site and that no one on his staff has been contacted by National regarding such use. The Dean's conclusions, however, are shown to be erroneous by statements submitted by National, one such statement by University President Finlay, signed nearly a year before Dean McGowan's letter, and a second statement written by University President O'Hare five months after the Dean's letter. In addition, National presented sworn statements by its consulting engineer, George Jacobs, and by its president's in-house attorney, R. Bruce Paschal, Jr., regarding contacts made with the University in August and September 1982. The Presidents' communications not only confirm the credibility of Mr. Jacobs' and Mr. Paschal's sworn statements but also indicate Fordham's continuously favorable disposition toward National's use of its antenna site. Although Poseidon notes that the affidavits by Mr. Paschal and Mr. Jacobs are based partly on hearsay, we believe, nevertheless, that both statements are credible and confirm the veracity of National's implied representation of an antenna site. Furthermore, taken as a whole, National's contacts with Fordham were sufficiently detailed to affirm that it was reasonable in espousing such an assurance, even though not all details of the arrangement were yet formulated.

11. We have long held that a broadcast applicant need not have a binding agreement or absolute assurance of a proposed site. What an applicant must show, and what National has shown, is that it has obtained reasonable assurance that its proposed site is available, with some

indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility. *Low Power Television Service*, 57 RR 2d 234, 242 (1984) (*Filing Windows*). This reasonable assurance may be acquired by informal telephone contacts by counsel for the applicant, and rent and other details may be negotiated at a yet undetermined future date. See *Puopolo Communications, Inc.*, 60 RR 2d 964 (Rev. Bd. 1986). The applicant, at the time it files its application, should have "obtained sufficient assurances in response to justify its belief that the . . . site [is] suitable and available until advised otherwise . . ." *Id.* at 966. National's representatives had three telephone conversations with Fordham officials prior to filing its amended application and each time received a favorable response to their site inquiries. During the third conversation its consulting engineer read *verbatim* the language from the application specifying the site. With these contacts in mind, we agree with the Bureau that, in addition to Poseidon's failure to meet its statutory burden of pleading, National had made a sufficient showing regarding assurance of a site.<sup>4</sup> Moreover, we agree with the Bureau that National's reasonable assurance should not be disallowed simply because the availability of the antenna site might ultimately depend upon Commission approval or disapproval of Fordham's currently pending site-change proposal. "Reasonable assurance" does not, for example, require zoning approval prior to grant of an application, notwithstanding a petitioner's reliance upon predictions of a zoning authority's approval or denial. See *Gareth F. Garlund and Anna White Garlund (KIQO)*, 69 FCC 2d 2006 (1978); and *Radio Ridgefield, Inc.*, 47 FCC 2d 106 (1974). Similarly, for us to disapprove the application based on the pendency of such procedures would be tantamount to our prediction that Fordham's application ultimately will not be granted.<sup>5</sup>

12. We agree with the Bureau's finding that applicant-supplied information concerning HAAT is neither a required nor an essential element in an application. Applicant-supplied HAAT data do not enter into the processing of low power television applications, since the information needed for our own HAAT specifications is computer-generated from the Commission's data base. HAAT is not called for on FCC Form 346, which instead solicits the height of radiation center above mean sea level, information which National did provide correctly in its application. Thus, National's amended application is not defective under the Commission's Rules.

13. We find Poseidon's arguments unpersuasive and therefore affirm the Bureau's decision denying its petition to deny National's application.

14. Accordingly, IT IS ORDERED, That the Application for Review filed by Poseidon Productions, Inc., IS DENIED.

15. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this Memorandum Opinion by Certified Mail—Return Receipt Requested to the parties named herein.

## FEDERAL COMMUNICATIONS COMMISSION

would expect National to advise us promptly, pursuant to Section 1.65 of the Commission's Rules, of the impact, if any, that the matter may have on the availability of its proposed site.

William J. Tricarico  
Secretary

## FOOTNOTES

<sup>1</sup> National tendered its original application to the Commission on January 12, 1981, proposing the Empire State Building as its antenna site. It amended its application on September 21, 1982, specifying its transmitting antenna site to be on a tower owned by Fordham University (Fordham), licensee of radio station WFUV-FM, in the Bronx, New York City. Poseidon's application for Channel 19, Astoria, New York (File No. BPTTL-810116ME) was the only competing application in the lottery.

<sup>2</sup> This submission was made in response to a request from the staff for information concerning the nature and extent of National's contact with Fordham regarding the availability of the tower site (1) before September 21, 1982, and (2) between September 21, 1982 and June 6, 1984.

<sup>3</sup> The Bureau noted, however, that Channel 19 in New York City was one of the channels proposed in a Rule Making to be made available to the private land mobile radio services and that National's application was predicted to cause interference to proposed land mobile operations. Thus, the Bureau stated that a construction permit would not be granted to National outright. Instead, National, pursuant to the procedures adopted in the Rule Making, was given thirty (30) days to submit a minor amendment. If the predicted interference were eliminated, the construction permit would be issued. Otherwise, stated the Bureau, the grant would be held in abeyance until the conclusion of the Rule Making, at which time National would be given a chance to amend to meet the adopted land mobile protection standards, if Channel 19 were selected. See *Further Sharing of the UHF Television Band by Private Land Mobile Radio Services*, 101 FCC 2d 852, 866, 896 (1985) (*UHF TV Band*). National did not submit a minor amendment. Therefore, the disposition of its application must await the outcome of the Rule Making.

<sup>4</sup> Poseidon's cited cases do not deal with situations similar to the one herein. In *Dutchess Communications Corp.*, 58 RR 2d 381 (Rev. Bd. 1985), the applicant had been informed by the site owner three years prior to the hearing that the site was no longer available. In *William F. and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974), the applicant did not contact the site owner until more than a year after compiling its application. In *Midwest St. Louis, Inc.*, 65 FCC 2d 572 (Rev. Bd. 1977), *aff'd as modified*, 79 FCC 2d 519 (1980), the applicant had been notified that its option for the site would not be renewed but did not inform the Commission until eight months later and attempted to amend its application to indicate that it had six different sites under consideration. *Rocket Radio, Inc.*, 56 FCC 2d 245 (Rev. Bd. 1975); *Rosemore Broadcasting Co., Inc.*, 46 FCC 2d 1182 (Rev. Bd. 1974); and *Flint Family Radio, Inc.*, 61 FCC 2d 165 (Rev. Bd. 1976), involved serious and direct conflicts in various affidavits, which could not be resolved on the basis of the pleadings.

<sup>5</sup> We note that on February 4, 1987, the Bureau dismissed Fordham's application because of prohibited overlap pursuant to Section 73.509(a) of the Commission's Rules, denied its request for waiver of that rule and gave Fordham thirty (30) days to correct any deficiency in its application. Fordham has filed a petition for reconsideration of that letter decision, and the petition is pending. Should Fordham be unsuccessful in its appeal, we